

No. 12132

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN D. WALKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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The Government's brief, in the humble opinion of appellant, does not answer the question presented to this Honorable Court to decide.

The only matter to be decided is whether the indictment states an offense against the United States. It appears appellee takes the position that Rule 7(c), Federal Rules of Criminal Procedure, cures any and all defects in the indictment. With this argument we cannot agree.

The Government having elected to prosecute under Section 3224(a), 26 U. S. C., should be held to plead properly under the section in order to state an offense.

Appellant has cited a number of cases in his brief in support of his contention, none of which have been questioned by appellee. We are not concerned with sections that pertain to the narcotic act that have no bearing on the issue here. We are concerned only with the issue

as to whether the indictment states an offense under Section 3224(a), 26 U. S. C.

A number of cases have been cited by appellee in its brief. In *U. S. v. Bickford*, 168 F. 2d 26 (C. C. A. 9), at page 27, it is said, "The court takes judicial notice of the power of its clerk." It is therefore contended that said case does not help us in determining the issue.

Also, *Flynn v. U. S.*, 172 F. 2d 12 (C. C. A. 9), the Court said, at page 13: "The counts are substantial in the language of the statute." The court said at page 14:

"This method of alleging the testimony of the accused to be false and corrupt was as effective as though the words 'false' and 'corrupt' had been used."

This case does not help in deciding the issues.

Also in *U. S. v. Ochoa*, 167 F. 2d 341 (C. C. A. 9), the Court said, at page 345:

"The indictment follows literally the language of the form for an 'Indictment for Murder in the First Degree of Federal Officer' set forth in the Appendix of forms to the Federal Rules of Criminal Procedure, Form 1. 18 U. S. C. A. following section 687.

"The Federal Rules of Criminal Procedure have the effect of law, and Rule 58 thereof gives the Appendix of Forms official illustrative status."

Certainly, this case should have no influence on the issue.

Also, *McCoy v. U. S.*, 169 F. 2d 776, all of the allegations necessary to be pleaded were pleaded and we have no argument in that regard.

Also, *Coleman v. U. S.*, 3 F. 2d 243, the indictment alleged the defendant sold the morphine without and not

in pursuance of a written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States. The indictment was based upon an entirely different section from the one that appellant has been charged with. It did include all of the essential elements to be pleaded under the act under which the indictment was drawn.

Also *Nigro v. United States*, 276 U. S. 332. The indictment was under a different section of the law. The issue determined does not decide the issue before this Honorable Court.

Also *United States v. Wong Sing*, 260 U. S. 18. The indictment was under different sections of the law and we believe the issue determined has no bearing upon the issue here.

Of the several cases cited by appellant in his opening brief (App. Br p. 3), it is believed that the case of *Stokes v. U. S.*, 39 F. 2d 440, is directly in point and favorable to the appellant's contention. We respectfully call the court's attention to this case. An analysis of the act is set forth in the opinion. The section involved is similar to the one at bar. The court stated at page 442:

"This limitation, therefore, would not be fatal to the indictment. It might limit the offense as charged against him under section 2, but, as the offense under section 2 refers to all persons, it would make no difference whether he was a person who had not paid the special tax or whether he was a person who had paid a special tax, unless he were a 'dealer,' which is not charged in count 1 of the indictment.

The defendant claims that count 1 of the indictment starts out in charging an offense under section

1 and completes the charge under the offense defined in section 2. This claim is perhaps correct, and would be fatal to the indictment if the first part of the indictment completed the charge of A under section 1 of the act by alleging that the defendant was a dealer within the meaning of the act. This, however, as heretofore stated, was not done."

Appellant in the case at bar was charged with being a dealer and it is respectfully contended that having failed to set forth the requirements of the statute by proper pleading, no offense has been stated. In the *Stokes* case it is said, at page 441:

"A, under section 1, has reference only to dealers, and dealers are only those persons who sell in or from original stamped packages. *Butler v. United States* (C. C. A.), 20 F. (2d) 570, 573. Therefore the offenses defined in A of section 1 are limited to dealers as defined in the act, while B, section 1, and the offense under section 2 refer to all persons."

In the case at bar there is no allegation that the appellant was one of the class required to register; there is no allegation that the heroin alleged to have been sold was in original stamped packages or from original stamped packages.

Conclusion.

It is respectfully urged that the judgment of conviction be reversed.

Respectfully submitted,

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Attorney for Appellant.